**U.S. Department of Labor**

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

**Issue Date: 07 June 2004**

CASE NUMBER: 2003-LHC-2381

OWCP NO.: 07-159202

IN THE MATTER OF

FRED JACKSON, JR.,
Claimant

v.

HALTER-MARINE, INC.,
Employer

and

ZURICH-AMERICAN INSURANCE CO.,
Carrier

APPEARANCES:

Tommy Dulin, Esq.
Dulin & Dulin, LTD.,
On behalf of Claimant

Collins C. Rossi, Esq.
On behalf of Employer/Carrier

BEFORE: Clement J. Kennington
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. **§** 901, *et. seq.* brought by Fred Jackson, Jr. (Claimant), against Halter Marine, Inc. (Employer), and Zurich American Insurance Co. (Carrier). The issues raised by the

parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. A hearing before the undersigned was held on February 5, 2004, in Gulfport, Mississippi.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their respective positions.[1] Claimant testified, called Glen Odom and Gregory Pearson, and introduced 22 exhibits, which were admitted, including: the deposition of Marvin McKinnon; various Department of Labor filings; medical records of Drs. Kergosien, Weiss, Kesler, Sumner and Smith; medical records from Coastal Family Health Center and Slidell Memorial Hospital; Job search forms, wage records and Claimant's personnel file; witness statements and photographs of Employer. Employer introduced 13 exhibits, which were admitted, including: Department of Labor filings; Dr. Kergosien's return to work form; medical report and deposition of Dr. Sumner; the 1/19/01 report of Dr. Kergosien; the 2/1/01 report of Dr. Kesler; the 2/20/01 report of Dr. Smith; and Claimant's personnel file.

The parties filed post hearing briefs. Based upon the parties' stipulations, the evidence introduced, my observation of witness demeanor, and the arguments presented, I make the following findings of fact, conclusions of law and order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An incident occurred on January 19, 2001.

2. An employer/employee relationship existed at the time of the incident.

3. Employer was advised of the injury on January 19, 2001.

4. Employer filed a Notice of Controversion on January 16, 2003.

5. An informal conference was held on June 16, 2002.

6. Employer paid the following compensation and medical benefits:

   Temporary total disability of $220.89 from January 27, 2001 to January 30, 2001; and

   Temporary partial disability of $17,023.43 from February 22, 2002 to December 27, 2002.

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__: Claimant's exhibits (CX-__, p.__); Employer exhibits (EX-__, p.__); Joint exhibits (JX-__, p.__).

## III. ISSUES

The parties presented the following unresolved issues:

1. Causation of Claimant's injuries;

2. Nature and extent of injuries;

3. Date Claimant reached maximum medical improvement;

4. Entitlement to medical benefits;

5. Claimant's average weekly wage at the time of injury;

6. Timeliness of Controversion and

7. Interest, penalties, and attorney's fees.

## IV. STATEMENT OF THE CASE

### A. Chronology

On January 19, 2001, while working as a rigger for Employer, Claimant suffered an electrical shock. He was taken to see Dr. Kergosien, who took him off of work for three days secondary to neck and low back pain and spasms. On January 24, 2001, Dr. Kergosien removed Claimant from work for one week. Claimant then returned to light duty at Employer's facility for approximately one year. On February 1, 2001, Claimant began treating with Dr. Kesler, a neurologist, for his cervical and lumbar pains. A February 6 cervical MRI revealed multiple changes, including a herniation at C6-7 and bulging at C3-4, C4-5 and C5-6. Dr. Kesler referred Claimant to neurosurgeon Terry Smith for a surgical consult. At the initial evaluation of February 20, 2001, Dr. Smith opined Claimant was not a candidate for surgery because his complaints of pain were too generalized. However, in April 2001 Dr. Smith recommended surgical intervention for Claimant's back problems. Claimant continued to treat with Dr. Kesler on a monthly basis, who diagnosed him with chronic lumbar pain with spasm, disc herniation with spinal stenosis and myofascial pain. He recommended steroid and Botox injections, which Claimant refused. Instead, Dr. Kesler prescribed Claimant Ultram, and then MS Contin for his pain.

Claimant was terminated from his light duty job on February 22, 2002; Employer voluntarily paid TTD benefits secondary to the medications he was taking for his injuries. On May 29, 2002, Dr. Sumner performed an IME which was significant for limited straight leg raise test and tenderness of the paraspinal muscles. Dr. Sumner also reviewed the MRI and CT scans

which indicated several abnormalities, including disc herniation at C3-4, bulging at C4-5 and stenosis at C6-7 as well as herniation at L4-5 and lesser changes at L2-3. Employer continued to pay Claimant TTD through December 27, 2002, when it terminated benefits.

**B. Claimant's Testimony**

Claimant is a high school graduate, who resides alone in Pearlington, Mississippi. He has difficulty reading, writing, and hearing. Claimant's former work included bridge construction at Marine Concrete. He was hired by Employer in 1993 as a rigger. Claimant testified he has never held a job which required him to maintain records or fill out paperwork. He testified he was in good health when hired by Employer, has never filed any other workmen's compensation claims or personal injury suits and was never convicted of a felony. He added that he has won every safety award offered by Employer. (Tr. 19-23, 33). Claimant testified he learned how to rig from on-the-job training. There were 3 other riggers, but he had been at Employer longest; the work centered around building ships on the dock. Claimant testified Marvin McKenzie was his boss, and Joe Biggs and Gregory Pearson were leadmen. (Tr. 20, 23-24).

Claimant testified that on January 19, 2001, he was moving a metal deck plate near a light pole when he suffered an electric shock. He was wearing thin yellow kitchen gloves at the time of the accident. Claimant was not exactly sure how he was electrocuted, except that the electrician told him there was water near the light pole and he stepped on a line which caused him to be electrocuted. However, Claimant then stated that the power lines were underground. Claimant testified the shock threw him to the ground and caused his whole body to hurt. Glen Odom arrived on the scene and suggested Claimant try to walk it off, but the pain was too severe. Terry Elie, Employer's safety man, took Claimant to see Dr. Kergosien who prescribed Celebrex and sent Claimant home for three days of rest. (Tr. 22, 25-28).

Claimant returned to Employer on light duty, repairing extension cords and grounds. He did not have prior experience in this area and worked in pain daily. He worked in this capacity for about a year, during which time he treated with Dr. Kergosien on a number of occasions. He also treated with Dr. Terry Smith, a neurosurgeon, who informed Claimant he had pinched nerves in his neck. Claimant testified Dr. Smith recommended surgery for his back, which he was willing to undergo but was not authorized by Employer/Carrier. (Tr. 29-30, 33). Claimant then treated with Dr. Roman Kesler, a neurologist, who recommended injections which Claimant refused. Claimant clarified that Dr. Kesler informed him the injections would have essentially the same effect as medication; Claimant chose medication because he was afraid of needles. (Tr. 30, 39-42). Dr. Kesler also informed Claimant he was diabetic; Claimant testified he had a family history of high blood pressure, but was unaware he had diabetes. He treated with Dr. Conn for these conditions; Dr. Conn also prescribed pain medication for his back and neck pain. (Tr. 31-32).

On February 22, 2002, Claimant's boss placed him on workmen's compensation after discovering the number of medications, including Oxycontin, Claimant was taking. Claimant testified he was told he could not safely work at Employer while taking these medications.

However, Claimant last received compensation in December 2002, and was unaware Employer terminated him. (Tr. 35-36). Claimant testified he has not worked since leaving Employer. He continued to suffer throbbing pain in his neck and back, and his hands also continued to ache. Claimant's activities were limited to the point where he could no longer sweep with a broom. Additionally, he only slept about 2-3 hours at a time; he testified he has been to sleep clinics to address this problem. Claimant testified Employer sent him to the doctors. (Tr. 32-33).

On cross, Claimant testified he has not suffered any injuries since the accident; however, he then stated his brother cut his hand with a knife. (Tr. 37-38). He testified he informed Drs. Kesler and Smith he was electrocuted when he grabbed the deck plate, but the electrician informed him he was electrocuted when he stepped on the line. Claimant testified his pain did not improve when he got up and walked around after the shock; in fact, it only got worse and he could barely get out of bed the next day. When informed that Dr. Smith's records indicated Claimant's pain improved after walking around, he stated they might be wrong. (Tr. 43, 46). Claimant also testified he was in contact with the shock for about 5-10 seconds, but it did not knock him unconscious. He added on re-direct examination that it had been raining the day of the accident. (Tr. 47, 49).

**C. Testimony of Glen Odom**

Odom was Employer's leadman for maintenance in January 2001. He knew Claimant personally, and recalled the accident of January 19, 2001. As a member of Employer's first response team, Odom was called to the scene, located approximately 200 yards from his office. When he arrived at the scene, he was told Claimant suffered an electric shock near the light pole; Claimant was on his hands and knees complaining of neck, back, leg and hand pain. Odom asked Claimant to try and get up to walk to the first aid station. Although Odom testified he was trained in CPR and first aid, no medical treatment was given to Claimant at the accident site. Claimant reported to Odom he felt muscle spasms in his hands, legs, neck and back. On cross, Odom stated he spent a total of 15 minutes with Claimant after the accident; although Claimant was able to walk some, he did not appear to get better. Odom testified he escorted Claimant to the first aid station, where he left him with Terry Elie who would have taken him to the hospital. (Tr. 51-53, 57-58).

Odom testified he worked around the electrical department quite a bit. After Claimant's accident he called an electrician to check out the work site. He was present when the electrician conducted the investigation, and informed Odom that there was water in the top of the light which caused it to short out and electrify the pole. Odom testified he did not write up a report of the accident or perform an investigation himself; as leadman for maintenance he was not responsible for correcting electrical malfunctions. (Tr. 55-56). However, upon surveying the accident site, Odom did not notice any exposed power lines, they were all buried underground. Odom testified further that the ground in the yard was muddy and wet from the rains; a puddle of water about 3 feet in diameter had formed at the base of the light pole. Odom stated the puddle was still electrified when he arrived, and Claimant was approximately 20 feet away when he arrived at the scene. (Tr. 59-61).

Odom testified there was no doubt Claimant had sustained an electric shock. He based this opinion on his own experience in being electrocuted. Odom stated Claimant's complaints of muscle contractions and aches were consistent with what he would expect a shock victim to suffer. (Tr. 60, 62).

**D. Testimony of Gregory Pearson**

Pearson was a maintenance electrician at Employer in 2001. He knew Claimant personally and was familiar with the January 19, 2001 accident in which Claimant was shocked. Pearson testified he arrived on the accident scene after Odom; Claimant appeared disoriented and in pain. (Tr. 64-65). Pearson testified there were 440-volt light fixtures attached to posts to illuminate the work area. Upon investigating the accident scene, he discovered one of the bulbs broke and filled with rain water, which ran down the pole and created a puddle at its base. This created a "hot zone" approximately 3 feet in radius. Pearson testified Claimant was shocked because he had his hands on a steel deck plate when he walked through this hot zone. He clarified a portion of the steel deck plate was still in the hot zone when he arrived on the scene, and Claimant was about 6-8 feet from the pole. On cross, Pearson testified the hot zone was 6 feet in radius. (Tr. 65-67).

Pearson testified the hot zone was only on the ground, which had been saturated with rain; he explained that water is a good conductor for electricity. When Claimant stepped into the hot zone he "became the ground" and was electrocuted when he touched the metal deck. Pearson testified it is possible for a person to have stood in the hot zone without sustaining a shock, which explained the multiple footprints in the hot zone. Pearson testified it was his understanding that Claimant was the only worker to walk through the hot zone while touching the deck plate. (Tr. 68-70).

**E. Exhibits**

**(1) Deposition of Marvin D. McKinnon**

McKinnon was the operator foreman at Employer in January 2001. He testified he knew Claimant personally and recalled the accident of January 19, 2001. McKinnon stated it had been raining "quite some time". The crew was in the process of pulling a deck plate from the bottom of the dry dock; when Claimant reached down to grab the plate it "lit him up" and shocked him. McKinnon testified Claimant was standing next to the light pole and the ground surrounding the pole was soaking wet. McKinnon was standing approximately 30 feet behind Claimant and off to the side, watching the operations. After he was shocked, Claimant bent over and appeared to be in serious pain. (CX-22, pp., 4-5).

On cross, McKinnon testified Claimant wore plastic yellow gloves at the time of the accident; he was the only person holding the deckplate to steady it on the crane. Claimant sustained the shock when he reached down to grab the plate; he could not let go for 30-40 seconds, and when he did he curled up in pain. McKinnon testified Claimant did not curl up on the ground, but rather just bent over. He was not able to straighten up, but did walk around some. McKinnon testified Claimant needed assistance getting into the safety van which took him to the first aid office. *Id.* at 7-10.

**(2) Medical Records of Charles Kergosien, M.D., Roman Kesler, M.D., Terry Smith, M.D. and Slidell Memorial Hospital**

In a report dated January 2, 2004, Dr. Kergosien stated he treated Claimant on three occasions, January 19, 24, and 29, 2001, for injuries he suffered in a work accident. At the initial evaluation the same day as the accident, Dr. Kergosien found Claimant's status was post-electrocution; he suffered decreased range of motion in his shoulders and muscle spasm in his lumbar and cervical spine. Dr. Kergosien prescribed Vioxx, an anti-inflammatory, and limited Claimant to bed rest for three days. (CX-9, pp., 1, 11-13). Claimant returned to Dr. Kergosien on January 24, 2001, with continued complaints of pain and leg cramps. The physical exam was consistent with paraspinal muscle spasm and blood work was positive for Type II diabetes, which had not been previously diagnosed. Dr. Kergosien diagnosed Claimant with electrocution, lumbar sprain and muscle spasms. He removed Claimant from work for one week. *Id.* at 1, 8-9. Claimant returned to Dr. Kergosien on January 29, 2001, presenting with pain in his left calf and increased low back pain which worsened when he bent over. Dr. Kergosien diagnosed Claimant with electrocution, muscle soreness, lumbago and cervical sprain; he released Claimant to light duty work with restrictions of lifting/carrying up to 20 pounds and no repetitive bending or twisting. *Id.* at 1, 3-5. Dr. Kergosien opined Claimant's hypertension, diabetes and sleep apnea were not related to the January 19, 2001 accident. However, the incident could have caused cervical disc heniation, lumbar spasms and hyperflexion. *Id.* at 2.

Claimant did not keep his February 12, 2001 appointment with Dr. Kergosien, and indeed, did not return to see the doctor after January 29. Frank Gates Service Company, Employer's worker's compensation carrier, referred him to neurologist Roman Kesler; the records indicate he treated Claimant on a monthly basis from February 1, 2001 through December, 2002. At the first examination, Claimant provided Dr. Kesler with a history of his electrocution incident and complained of tightness in his hands; spasm in the lower spine with twisting; and cramps in his legs, torso and hands. Dr. Kesler noted most of the symptoms were in his upper extremities. He did not diagnose Claimant in his initial report, but he did prescribe Zanaflex and restricted Claimant from lifting more than 10 pounds at work. (CX-12, pp. 58-59).

Claimant returned to Dr. Kesler on February 16, 2001, with complaints of significant soreness, cramping, spasm and low back pain. A February 6 cervical MRI showed diffuse degenerative changes, spinal stenosis, disc herniation at C6-7 and disc bulging at C3-4, C4-5 and C5-6. Dr. Kesler reported Claimant probably had a baseline degree of disc protrusions and spinal vertebral disease prior to the electrocution. He opined Claimant very possibly suffered a whiplash-type injury on January 19, 2001, which worsened his cervical spine disease. (CX-12, pp., 48-49). Dr. Kesler classified Claimant's status as post-electrical injury with persistent

muscle spasm and soreness, and hyperflexxia. *Id.* at 51. He referred Claimant to neurosurgeon Terry Smith for a surgical evaluation. Dr. Smith first examined Claimant on February 20, 2001, at which time Claimant provided a history of being shocked while at work; he stated he was unable to let go of the deckplate for a few seconds, before the shock threw him off. Dr. Smith's report states that Claimant felt better when he walked off the shock; Claimant's symptoms did not start until the following day. Claimant complained of sore hands, cramps in his left flank, pain in his left arm and cramping in his left hand. He reported some pain in his leg, neck and left shoulder. Dr. Smith reviewed the February 6 MRI, which did not evidence any compression of the spinal cord. In his initial report, Dr. Smith opined the electricity may have caused muscular symptoms and Claimant did suffer from disc abnormalities in his cervical spine. However, he stated that Claimant's symptoms were too diffuse for surgery to be effective. (CX-14, pp. 18-19).

Claimant attended six physical therapy sessions between February 23 and March 13, 2001. Initially, he displayed symptoms consistent with cervical muscle spasms and tested positive for tennis elbow in the left arm. However, Claimant's overall progress was inconsistent in that the range of motion in his cervical spine, trunk and straight leg raises increased, but the motion in both of his shoulders decreased. Additionally, his right upper extremity decreased in range of motion, but did not exhibit any deficits upon examination. The physical therapist reported that on March 13, 2001 Claimant did not suffer structural dysfunction, muscle spasm or guarding. The thoracic outlet syndrome test was negative and Claimant's posture had improved. Nonetheless, Claimant continued to complain of extreme pain. (CX-14, pp. 14-16). Claimant returned to Dr. Kesler for a follow-up appointment on March 1, 2001. He complained of increased cramping, and Dr. Kesler reported Claimant suffered from muscle spasm and soreness with possible radiculopathy in the upper extremities. He recommended a lumbosacral MRI, NCS/EMG testing, as well as medication and physical therapy. (CX 12, pp., 47-48). On March 20, 2001, Claimant presented to Dr. Smith with pain all over, although worse pain in his lower back, and a patchy loss of sensation in his left arm and leg. On April 3, 2001, Dr. Smith ordered myelographic CT scans of Claimant's cervical and lumbar spine. The tests revealed a large disc herniation at C3-4, a disc bulge at C4-5, mild degenerative changes with bulging and bony spurring at C5-6, spinal stenosis at C6-7, acquired spinal stenosis with bilateral narrowing at L4-5 and less pronounced narrowing at L2-3. In a letter to Dr. Kesler dated the same day, Dr. Smith indicated Claimant was willing to go ahead with surgery in order to avoid steroid injections; although he could not decide if his lower back or neck hurt worse. Dr. Smith also reported breakaway weakness in Claimant's left arm upon examination. (CX-14, pp., 8-13). Dr. Smith released Claimant to sedentary work duties on April 18, 2001. On April 24, 2001, he opined in a letter to Claimant's nurse case manager that Claimant most likely ruptured a disc while lifting which then caused the electric shock; he stated Claimant was not at MMI because there was much more work to be done. *Id.* at 5-7.

On April 26, 2001, Claimant presented to Dr. Kesler with severe pain in his lower back and neck; Dr. Kesler diagnosed him with possible spinal stenosis and disc herniation on multiple levels. On June 7, 2001, Dr. Kesler recommended epidural blocks, which Claimant refused. (CX-12, pp., 43-45). Claimant saw Dr. Smith on July 7, 2001, who reported he had tenderness and limited range of motion in his neck and back. Worker's compensation had not yet approved his recommendation for surgery. (CX-14, p. 2). On August 2, 2001, Claimant returned to Dr.

Kesler, expressing anger and frustration with how his claim was being handled by the worker's compensation people. However, Claimant refused Dr. Kesler's recommendation of Botox injections to relieve his spasm; he expressed a desire to get the surgery approved, instead. (CX-12, p. 41). In a September 25, 2001 letter to the claims adjuster, Dr. Smith opined an electric shock could cause severe spasm and precipitate disc herniation. Claimant's structural abnormalities were consistent with his complaints and, according to Dr. Smith; these abnormalities were related to Claimant's January 19 work accident because he was functional before the incident but did not function afterwards. (CX-14, pp., 1-2).

Claimant presented to Dr. Kesler with shooting pains in his left leg in September and significant muscle spasm in October, 2001. Dr. Kesler continued to prescribe pain medication and recommend Botox or trigger point injections, which Claimant refused. On November 29, 2001, noting Ultram provided Claimant minimal pain relief; Dr. Kesler began prescribing him MS Contin. *Id.* at 33, 37, 39. Claimant presented to Dr. Kesler on January 10, 2002, with increased muscle tone and spasm in the cervical and lumbar spine. Dr. Kesler diagnosed him with chronic low back pain with spasm, spinal stenosis with disc herniation and myofascial pain. He referred Claimant for a muscle stimulator, which did not provide relief. (CX-12, p. 30). Claimant's condition remained essentially unchanged through August, 2002, with the exception of some additional complaints of paravertebral tenderness and left lateral leg tenderness. Claimant continued to refuse trigger point injections out of a fear of needles, and opted to stay on the MS Contin instead. *Id.* at 8-29.

On September 11, 2002, Claimant presented to Dr. Kesler with shooting pains in his left leg and worse pain in his neck which radiated into his left shoulder. Upon examination, Dr. Kesler noted increased spasm and pain in the neck and low back. He diagnosed Claimant with myofascial spasm and pain syndrome, cervicalgia, low back pain with possible sciatica and degenerative disc disease; Dr. Kesler recommended NCS/EMG studies of Claimant's arms and legs but it was not approved. (CX-12, pp., 4-7). On November 13, 2002, Dr. Kesler indicated the EMG had been approved, but only with a doctor in New Orleans; Claimant reported he was unable to withstand the drive to New Orleans for the study. Claimant's back condition was constant through December, 2002. The last follow-up appointment included in the record was dated December 18, 2002, in which Claimant appeared in significant distress and felt he made no progress since his accident almost two years earlier. *Id.* at 1-3.

On April 6, 2003, Claimant was admitted to Slidell Memorial Hospital with complaints of blurry vision, body aches and fatigue. An emergency room exam indicated Claimant was obese but not in distress, and he exhibited full range of motion and non-tenderness in his neck and back. He reported his pain to be a constant 5 out of 10. On April 7 Claimant completed a graded treadmill exercise test which he terminated after 7 minutes and 20 seconds secondary to fatigue. On April 8 and 9 he denied any pain. Claimant was discharged on April 9, 2003 with a diagnosis of uncontrolled diabetes, chest pain, coronary artery disease and hypertension. (CX-15, pp., 124-188).

**(3) Deposition and Medical Records of Austin John Sumner, M.D.**

Dr. Sumner is the head of neurology at Louisiana State University's School of Medicine in New Orleans, Louisiana. He has a degree in neurophysiology and is a specialist in electric diagnostic medicine; as such, Dr. Sumner testified he was familiar with the general principles of electricity and how it worked within the nervous system. He has used electricity as a diagnostic tool and has treated many electrocution victims. (EX-13, pp., 4-6). Employer retained Dr. Sumner to conduct an independent medical evaluation of Claimant on May 29, 2002. Dr. Sumner testified he reviewed Claimant's medical records prior to the examination. The history he elicited from Claimant was fairly consistent with other doctors' reports; Claimant informed him he was holding a metal deckplate when he was shocked and thrown to the ground. (EX-13, pp., 6-10). Dr. Sumner testified Claimant had a number of general complaints of chronic pain in his neck, arms, low back and legs, but did not focus on one principle complaint; this made it difficult for Dr. Sumner to understand the physiological basis of his pain. Claimant complained about everything, and tried to relate it all to the electrical shock. *Id.* at 9-10.

During the examination, Claimant complained of difficulty using his left hand and low back pain shooting into his left leg. He was taking MS Contin for pain, Cloridine for spasm, and diabetic medication. Dr. Sumner testified Claimant appeared generally strong, straightforward and not in great distress. The examination was significant for positive left straight leg test, tenderness of the paraspinal muscles in the neck and low back, but without trigger points or spasm. On cross, Dr. Sumner stated a limited straight leg raise indicates nerve root compression in the lower back. (EX-13, pp., 11-12, 45). Dr. Sumner testified Claimant had a "giveaway performance" in his arm strength, which was a sign that Claimant believed himself to be weaker than he actually was. Additionally, the fact that Claimant did not feel normal anywhere was an additional indication of somatization. However, on cross, he stated Claimant was straightforward, open, pleasant and cooperative during the examination; although he did not seem well-educated, Dr. Sumner testified Claimant was not consciously manipulative, evasive or deceiving. The most precise term to describe Claimant was "exaggeration". Dr. Sumner added that the objective portion of the exam was normal. *Id.* at 12-13, 33, 36, 43-44. However, he then testified Claimant's MRI and CT Myelogram showed bulging discs at L2-3 and L4-5 and significant pathological findings at C6-7 as well as C3-4 and C4-5. Because Claimant had a structural basis for some of his symptoms, Dr. Sumner testified he did not suffer conversion neurosis, or psychological, non-physiological symptoms triggered by a 'stressor'. *Id.* at 14-15, 36.

In a letter dated November 1, 2002, Dr. Sumner opined Claimant's cervical and lumbar spine condition were pre-existing and degenerative in nature; they could not have been the result of a single acute incident. Specifically, the discs were dehydrated with bony lips and spurs which take months and even years to evolve. (EX-13, pp. 15, 24). At his deposition, he testified the circumstances of the accident did not seem appropriate for a significant electrical injury; specifically, the rubber gloves and boots Claimant wore would have acted as significant insulators against the electricity. Also, it was not known exactly how much voltage passed through Claimant's body; Dr. Sumner testified he did not notice any burn marks on Claimant's hands or feet which would have been present after a high-voltage shock. Although a shock will not always result in a burn, the presence of burns would indicate the intensity of the shock.

Additionally, Claimant did not lose consciousness, did not seize, and only fell to a bent position; Dr. Sumner opined he suffered a moderate shock, at most. Dr. Sumner testified the electrician's formulation of how the shock came about was also not completely credible. (EX-13, pp., 16-17, 20-22, 38, 40).

Dr. Sumner further testified that absent any electrical shock injury, Claimant's diabetes and degenerative disc disease were sufficient to cause his complaints of pain. Dr. Sumner added that spinal stenosis usually is not painful; the pain comes from the radicular component caused by compression and irritation of the nerve roots. He explained diabetes can make one's nerves more fragile to compression and it may have exacerbated his existing disc disease. Dr. Sumner also testified Claimant's general aches and pains could be a result of his diabetes. Although he stated that diabetes can cause neuropathy, Dr. Sumner testified Claimant's numbness was not frank diabetic neuropathy. (EX-13, pp., 16, 23, 25). However, Dr. Sumner also testified the electrocution could have exacerbated Claimant's pre-existing conditions, adding that probably a small percentage of his current condition is attributable to the work incident. He further stated that the entirety of Claimant's complaints exceed what is normally expected of a person with degenerative disc disease. *Id.* at 24-25, 28.

Dr. Sumner testified Claimant was not currently a candidate for surgery. (EX-13, p. 30).

## V. DISCUSSION

### A. Contentions of the Parties

Claimant contends he sustained a 480-volt electric shock while he was moving deck plates in the course and scope of employment. Claimant argues the shock caused his cervical disc herniation, lumbar spine spasms and hyperflexion. He contends he has not had his choice of physician and that Employer/Carrier has denied reasonable medical care, including the lumbar and cervical surgeries recommended by Dr. Smith in April, 2001. Additionally, Claimant argues Employer/Carrier have not paid the proper amount of benefits in that they denied the Informal Conferences' recommendation of reinstating temporary total disability. Claimant argues the modified work he performed from February, 2001 to February, 2002, caused him extreme pain, and he has not yet reached MMI. Claimant contends his average weekly wage should be computed pursuant to Section 10(c) and that he earned $604.13 at the time of his accident. Further, he asserts Employer/Carrier did not file a timely Controversion, thus, entitling him to penalties.

While Employer/Carrier does not contest the accident itself, they contend Claimant's electric shock did not result in any disability. Specifically, they argue Dr. Kesler and Dr. Smith related Claimant's injuries to the accident without any well-reasoned medical opinions. Employer/Carrier further argues Dr. Sumner, an expert in electrocution injuries, concluded Claimant's complaints were inconsistent with electric shock injuries. Thus, Employer/Carrier contends Claimant did not suffer a compensable injury on January 19, 2001.

## B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In the present case, I found Claimant to be a straightforward witness. Although his testimony contained some inconsistencies, I found they were neither significant nor intentional. Overall, Claimant was forthcoming with his testimony and I find no basis for which to discredit him as a witness.

## C. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Wright v. Connolly-Pacific Co*., 25 BRBS 161, 168 (1991). The Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.[2] 33 U.S.C. § 920(a) (2003). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. 556(d) (2002); *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 281 (1994).

### (1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2003). To establish a prima facie claim for compensation, a claimant need not affirmatively

[2] This is not to say that the claimant does not have the burden of persuasion. To be entitled to the Section 20(a) presumption, the claimant still must show a *prima facie* case of causation. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

In the present case, Dr. Kergosien diagnosed Claimant with lumbar and cervical spasms. A cervical MRI taken on February 6, 2001, showed a disc herniation at C6-7 and bulging at C3-4, C4-5 and C5-6. Additionally, April 3, 2001 myelographic CT scans of Claimant's cervical and lumbar spine revealed disc herniation at C3-4, bulging at C4-5, spurring at C5-6, stenosis at C6-7, stenosis and narrowing a L4-5 and minor changes at L2-3. Throughout his treatment with Dr. Kergosien, Dr. Kesler, Dr. Smith and Dr. Sumner, Claimant displayed consistent complaints of cervical and lumbar pain with radiating pain into his left leg and left arm. As such, Claimant has established he suffered a physical harm or pain, the first requirement under Section 20(a).

Additionally, Claimant has established that his cervical and lumbar symptoms could have been caused by his work incident. Claimant, McKinnon, Odom and Pearson all testified Claimant suffered an electrical shock while at work on January 19, 2001. Dr. Kergosien reported that the shock incident could have caused Claimant's cervical disc herniation, lumbar spasms and hyperflexxion. Dr. Kesler and Dr. Sumner both opined that Claimant had pre-existing degenerative disc disease, but that it was very possibly aggravated by the January 19, 2001 electrical shock. Specifically, Dr. Kesler reported that Claimant may have suffered a whiplash-type injury, exacerbating his pre-existing condition. Dr. Smith, Claimant's neurosurgical consult, opined Claimant's condition was related to his work incident because he was functional before, but could not function after. Based on the medical records, I find it is reasonable to conclude that Claimant suffered some degree of pre-existing disc disease which was exacerbated and aggravated by the work incident of January 19, 2001.

**(2) Rebuttal of the Presumption**

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995)(failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); *Hampton*

*v. Bethlehem Steel Corp*., 24 BRBS 141, 144-45 (1990)(finding testimony of a discredited doctor insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion--only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

*Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986)(emphasis in original). *See also, Orto Contractors, Inc. v. Charpender*, 332 F.3d 283, 290 (5th Cir. 2003), *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003)(stating that the requirement is less demanding than the preponderance of the evidence standard); *Conoco, Inc.*, 194 F.3d at 690 (stating the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp*., 14 BRBS 626, 628 (1982), *aff'd mem*., 722 F.2d 747 (9th Cir. 1983)(stating the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)(stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption").

In the present case, Employer retained Dr. Sumner to perform an IME of Claimant on May 29, 2002, more than one year after the incident. In his March 26, 2004 deposition, Dr. Sumner testified Claimant's back condition was pre-existing and degenerative and could not have resulted from a single acute incident. Specifically, Dr. Sumner testified that based on the February 6, 2001 MRI and April 3, 2001 CT scans, Claimant's spinal discs were dehydrated, with spurring which takes months and years to evolve. Additionally, Claimant suffered from diabetes which made his nerve roots more sensitive to compression and, when combined with the degenerative disc disease, would have been sufficient in and of itself to precipitate Claimant's pain. Dr. Sumner also stated the circumstances surrounding Claimant's work accident indicate it was probably a moderate shock, at best.

Although Dr. Sumner found Claimant exaggerated his symptoms, he considered Claimant open, cooperative and straightforward. Additionally, he testified that while Claimant's diabetes and degenerative disease could have directly caused his condition, Dr. Sumner also stated that the moderate electrical shock could have exacerbated Claimant's pre-existing spinal condition. He specifically testified that at least a small portion of Claimant's current spinal problems were attributable to his work incident. Although Dr. Sumner indicated Claimant suffered degenerative disc disease which was most likely complicated by his diabetes, his testimony is disputable because he testified the electrocution could have exacerbated this pre-existing condition. As such, I find Dr. Sumner's testimony is not unequivocal and does not constitute sufficient evidence to rebut the Section 20(a) presumption. Employer/Carrier submits no other affirmative evidence with which to rebut the Section 20(a) presumption. Thus, I find Claimant's cervical and lumbar spine conditions were exacerbated and aggravated, by his January 19, 2001 work incident.

## D. Nature and Extent

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

In the present case, Dr. Smith opined Claimant had not reached MMI as of April 24, 2001. He recommended surgery, which was denied by the worker's compensation carrier. Claimant treated with Dr. Kesler on a monthly basis from February 1, 2001 through December 18, 2002, presumably when Employer/Carrier terminated benefits. Throughout this time, he received pain medication, first Ultram and then MS Contin. Claimant was also advised of Botox and trigger point injections to relieve his pain, but he refused these treatments because he was apprehensive of needles and was told the injections would have the same affect as the medication. Claimant has not been seen by a doctor in over one and one-half years; Dr. Smith's recommendation for surgery and opinion that Claimant was not at MMI is now over 3 years old. As such, I find there is insufficient medical evidence with which to determine an MMI date. Therefore, I find Claimant continues to be temporarily disabled.

### (1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS*

*Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, Dr. Kergosien released Claimant to light duty with restrictions of no lifting or carrying more than 20 pounds and no repetitive bending or twisting. Dr. Kesler restricted Claimant to lifting no more than 10 pounds. Dr. Smith released Claimant to sedentary work restrictions on April 18, 2001. No doctor has released Claimant to his prior job as rigger. Indeed, Claimant was terminated from his light duty job because of the side effects from his medication. As such, Claimant has established a *prima facie* case of total disability.

**(2) Suitable Alternative Employment**

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999)(crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540. 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992).

In the present case, Employer provided Claimant light duty work in their facilities for one year following his injury. Although Claimant testified he had no previous experience with this work and worked in pain, there was no other evidence to suggest Claimant could not perform the light duty work or that it was sheltered employment. When Employer terminated Claimant secondary to his work related injury, it had a renewed duty to provide him with suitable alternative employment or pay him temporary total disability. Employer did pay Claimant disability benefits through December 2002; however, it did not retain a vocational expert or attempt to locate such suitable alternative employment for Claimant subsequent to terminating his benefits. As such, I find Claimant continues to be temporarily totally disabled from his work related accident of January 19, 2001.

**E. Average Weekly Wage**

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at

the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000); 33 U.S.C. § 910(d)(1). When neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied" Section 10(c) is an applicable catch-all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c) (2002); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998).

In the present case, there is no evidence of Claimant's daily wages, as required by § 10(a), and no evidence of the daily wages of a similarly situated employee, as required by § 10(b); thus, I find § 10(c) may be used to determine Claimant's average weekly wage at the time of injury. Claimant contends he is entitled to an average weekly wage of $604.13. However, Claimant does not indicate how he arrived at this number. The only wage records admitted into evidence are in CX-17. This exhibit is a listing of Claimant's paychecks, their date and the pay period each check applied to. Pursuant to CX-17, Claimant earned a total of $30,151.5 in the year preceding his injury, or $579.84 per week. This was the amount on which Employer based its payments of temporary total disability benefits, and I find it also constitutes Claimant's average weekly wage at the time of his injury.

**F. Choice of Physician**

When an employer learns of its employee's injury, it must authorize medical treatment from the employee's own choice of physician. 33 U.S.C. §§ 907(b), (c)(2). In determining whether a doctor is the employer's physician, and not the claimant's choice, "the relationship between the doctor and the employer must be such that it is reasonable to assume that the employer will adopt or has adopted the doctor's medical conclusions." *Slattery Assoc., Inc. v. Lloyd and Director, OWCP*, 725 F.2d 780, 785 (D.C. Cir. 1984). In the present case, Claimant contends he has not been treated by his choice of physician. However, nothing in the record indicates Claimant requested to be treated by a specific physician. Although Employer's worker's compensation carrier initially referred Claimant to Dr. Kesler, who in turn referred Claimant to Dr. Smith, Claimant continued to treat with Dr. Kesler on a monthly basis for approximately one and one-half years. Additionally, Employer/Carrier did not adopt the opinions of Drs. Kesler or Smith, instead sending Claimant to Dr. Sumner for an IME. As such, I find Drs. Kesler and Smith are not Employer/Carrier's physicians, but rather that Claimant has adopted them as his own choice of physician. Because Claimant did not request to be treated by a different physician, I find there is no basis to his claim that he did not receive treatment by his choice of physician.

**G. Reasonable Medical Services**

Claimant contends Employer/Carrier have improperly denied reasonable and necessary medical treatments, including cervical and lumbar surgeries recommended by Dr. Smith in April 2001. Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.,* 16 BRBS 255, 257-58 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ).

In the present case, Dr. Kesler referred Claimant to Dr. Smith for a surgical consult. Although initially stating that Claimant was not a surgical candidate because of his general complaints of pain, Dr. Smith recommended surgery for Claimant in April, 2001. Dr. Sumner performed an IME of Claimant in May, 2002 and in April, 2004; he testified Claimant was not a candidate for surgery. I note that Dr. Smith indicated in April, 2001, that surgery may or may not help Claimant; in July, 2001, he informed Claimant he had nothing to offer him until the surgery was approved by Worker's Compensation. Additionally, Dr. Kesler continuously recommended injections to improve Claimant's pain; said injections were refused by Claimant. I noted that the evidence in this case does not establish that the surgery suggested by Dr. Smith was either reasonable or necessary. Dr. Smith only treated Claimant for a short period of time, and there was no second opinion affirming his recommendation for surgery.[3] As such, Claimant's contention that Employer/Carrier denied reasonable medical treatment by refusing to approve the surgery is without merit.

**H. Timeliness of Controversion and Section 14(e) Penalties**

Claimant contends Employer did not file a timely Notice of Controversion and that he is entitled to penalties under the Act. Claimant's injury occurred January 19, 2001. Pursuant to

[3] I note that Dr. Sumner testified that Claimant was not a candidate for neurosurgery. Had Claimant established that the surgery was reasonable and necessary, I find Dr. Sumner's opinion would not have rebutted it because it was rendered at his March, 2004, deposition, almost two years after he examined Claimant for the IME.

CX-17, he received a paycheck on January 26, 2001 for work performed after his accident. Also, pursuant to the stipulations, Employer paid Claimant TTD from January 27, 2001 to January 30, 2001. After this, Claimant returned to work at Employer in a light duty capacity, where he remained until terminated on February 22, 2002. According to the stipulations, Employer paid Claimant TTD from February 23, 2002 through December 27, 2002. Claimant filed his claim for compensation on July 23, 2001. Employer/Carrier filed its Notice of Controversion on January 16, 2003. (*See* CX-1, CX-2, CX-3, CX-4, CX-5, CX-6, EX-5).

Generally, where an employer voluntarily pays compensation benefits 14 days after they become due, but then subsequently terminates benefits, Claimant may be entitled to Section 14(e) penalties unless the employer files a notice of Controversion within 14 days after a controversy arises between the parties. *Ramos v. Universal Dredging Corp.*, 15 BRBS 140, 145 (1982). In the present case, Claimant's compensation became due 14 days after December 27, 2002, or on January 10, 2003. A dispute between the parties arose on that date, when the compensation became due but Employer failed to pay. Thereafter, Employer had 14 days, or until January 24, 2003, to file its Notice of Controversion. Thus, Employer's filing of the Notice of Controversion on January 16, 2003, was timely and Claimant is not entitled to Section 14(e) penalties.

**I. Interest**

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

**J. Attorneys' Fees**

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must

accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from December 28, 2002 to present and continuing based on an average weekly wage of 579.83.

2. Employer shall pay Claimant for all past and future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

3. Employer shall Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON